Nos. 81-2147 and 81-2188

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA and
THE NAVAJO NATION, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE
NORTHERN CHEYENNE INDIAN RESERVATION, ET AL

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE NAVAJO NATION FOR LEAVE TO FILE A POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM

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FILE A POST-ARGUMENT MEMORANDUM

Under Rule 35.6 of the Rules of this Court, respondent Navajo Nation moves for leave to file the annexed post-argument memorandum.

These consolidated cases were argued on March 23, 1983. Following the argument, the federal government concluded that certain questions from the Bench had not been adequately answered by counsel. Accordingly, the government submitted a post-argument memorandum to address two points not treated, or treated only peripherally, in the principal briefs of the parties.

Subsequently, petitioners in No. 81-2147 submitted their own post-argument memorandum. The Court granted leave to file both memoranda on April 4, 1983. Respondent Navajo Nation was not served with a typescript of petitioners' memorandum until after that date. The printed version of the memorandum was served later.

Although ostensibly intended only to answer the government's memorandum, petitioners' memorandum in fact goes beyond that end and includes a number of representations regarding state water proceedings that are inaccurate and not supported by the record in this Court. For this reason, and because of the critical importance of this litigation to the respondent Indian tribes, the Navajo Nation seeks leave to file the annexed short memorandum limited to the erroneous points advanced by petitioners.

Respectfully submitted,

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April 15, 1983

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POST-ARGUMENT MEMORANDUM FOR THE NAVAJO NATION

As set forth in our main brief, this is not one of those "exceptional" and rare cases subject to the narrow abstention rule of Colorado River Water Conservation District v. United States ("Akin"), 424 U.S. 800 (1976). Rather, this is the more typical case where, in the words of Akin, the federal courts should discharge their "virtually unflagging obligation * * * to exercise the jurisdiction given them." Id. at 817.

Petitioners' post-trial memorandum ignores those fundamental principles and deals instead with side issues. We address those issues briefly here to identify the errors

in petitioners' presentation. We stress, however, that the issues raised in the flurry of post-argument briefs are of limited significance.

A. THE NAVAJO NATION'S FEDERAL ACTION WILL NOT DUPLICATE OR CONFLICT WITH ANY GENERAL STREAM ADJUDICATION IN STATE COURT

In response to the government's post-argument submission, the Arizona petitioners have once again argued that adjudication of Indian reserved water rights in federal court will duplicate or conflict with state general stream adjudications. Petitioners base this argument on the premise that a federal court, in determining an Indian tribe's federal water rights, must first determine the total amount of water available in a given stream. The latter determination, petitioners contend, is also an essential ingredient in a state general stream adjudication, and federal and state courts might differ in their results.

Because petitioners' premise is faulty, their conclusion is unjustified. The fact is that "complete knowledge of the availability of water" (Petitioners' Memorandum 1) is not in any way a prerequisite to the adjudication of an Indian tribe's reserved water rights. The nature and extent of those reserved rights depend on the "practically irrigable acreage" included within a reservation and the amount of water needed to irrigate those acres. Arizona v. California, 373 U.S. 546, 600 (1963). The tribe's legal entitlement to water does not vary with the amount of water actually available in a stream. It is a constant that does not fluctuate with the caprice of nature.

In practice, of course, the amount of water actually available places a natural cap on the total amount of water that can be used. The amount of water available in a particular stream or in a particular year may not be sufficient to satisfy the legal rights of all users on that stream. That is precisely why it is necessary to quantify the rights of different users and assign priority dates to them. The entire adjudication process is designed to deal with a situation of shortage. It determines what happens when there is not enough water to satisfy the legal rights of all users.

Petitioners' contention that "it is legally impossible to imply an intent to reserve water that does not exist" (Petitioners' Memorandum 2) misses the point entirely. When the federal government created the Navajo reservation in 1868, it did not conduct a hydrological study to determine the average annual water capacity of the Little Colorado River. The government simply reserved certain lands to the tribe and in doing so also reserved "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138 (1976). The measure of the amount of water so reserved is, under Arizona v. California, supra, the amount needed to irrigate all the practically irrigable acreage on the reservation. For practical reasons, the upper limit on the amount of water the Navajo may use is the amount of water actually available. But the latter figure does not measure the Navajos' rights; it merely determines the extent to which those rights may be exercised.

Cappaert v. United States, supra, on which petitioners mistakenly rely, is not to the contrary. In Cappaert, the question was whether the government had intended to reserve any unappropriated water at all. No issue of amount was involved. The Court simply held that the federal reservation of public land did imply an accompanying federally reserved water right. Here, of course, the existence of such rights in the respondent Indian tribes is undisputed.

Like all rights in the Little Colorado River, the Navajos' rights cannot be exercised if the river runs dry. Similarly, the Navajos' rights cannot be exercised if rights having an earlier priority exhaust the river's supply of water. It is in this sense that the government's post-argument memorandum observed that a federal decree quantifying the tribe's entitlement "is doubly conditioned" (U.S. Memorandum 4). Now, referring to the "conditional" character of any federal decree that may be entered, petitioners assert that the tribes' federal remedy must either duplicate or conflict with a contemporaneous state general stream adjudication. The point does not follow logically, and petitioners do not explain why it should. The federal court should simply determine the amount of water to which the tribe is entitled and the priority date or dates applicable to that entitlement. The tribe's ability to exercise its rights in a given year will depend on the availability of water and the extent of prior appropriated rights. The latter subject may well be addressed in a state general adjudication, but that does not mean that a state court decree would or could conflict with the federal decree.

The state court decree will list a hierarchy of users, each with a priority date and a quantity of water.

The priority date and quantity to which the Navajo are entitled will stem from the federal decree, whereas the dates and quantities of other users will stem from the state adjudication. Available water will then be used in accordance with this hierarchy, and if it runs out -- because of the vagaries of nature or the consumption of those at the top of the hierarchy -- junior claimants will be excluded. There is no state-federal conflict of any kind in this procedure.

Contrary to petitioners' suggestion, the fact that portions of the Navajo's federal reserved rights may have been created at different times in no way changes the nature of the federal court's inquiry or the feasibility of performing that inquiry in federal court. With respect to each separate portion of the Navajo's entitlement, the federal court will determine the amount of water involved and the applicable priority date. The situation is no different from what it would be if several Indian tribes were granted reserved water rights in the same stream. In either event, the federal court would treat the separate reservations seriatim.

In attempting to demonstrate the alleged superiority of state courts as a forum for the determination of Indian reserved rights, petitioners rely heavily on the "specialized technical assistance" assertedly available to state courts and the advantages that such assistance supposedly confers (Petitioners' Memorandum 3-4). Petitioners' claims that such assistance exists and will be available are wholly unsupported in the record before this Court. The record shows that, since the state proceeding involving the Little Colorado was

"commenced" by the filing of a petition some years ago, nothing whatsoever has occurred, and that the proceeding will take decades to complete. In the years prior to the argument of this case in the Ninth Circuit, Arizona failed to serve process on a single claimant, much less to create or utilize any "technical assistance" to evaluate the claims.

Moreover, the advantages that petitioners ascribe to the state courts' alleged access to technical expertise are highly problematical. Petitioners say that "[b]y knowing the porosity of soils, the history of cropping patterns and the irrigation techniques," state courts may determine that some water users are not in fact using their full entitlement, and on that basis may recognize new rights (Petitioners' Memorandum 4). This statement is puzzling, to say the least. To the extent petitioners may be referring to appropriated rights, the quantity of a user's entitlement is determined by the amount of water put to a beneficial use. Because use determines entitlement, it is difficult to understand what petitioners mean when they refer to a "prior user [that has] consumptively used only 60% of its water entitlement" (ibid.). On the other hand, if petitioners are referring to reserved rights, their position is completely misguided. The entitlement of a holder of reserved rights does not depend on the amount of water actually used. Arizona v. California, supra, 373 U.S. at 597; Cappaert v. United States, supra, 426 U.S. at 138-139. That is the whole point of the distinction between reserved and appropriated rights. Even if a holder of reserved rights does not use its full entitlement, a state is not free to recognize new rights that would supersede the

rights reserved by the federal government. An Indian tribe holding reserved rights is itself entitled to control the disposition of the water set aside at the time the tribe's reservation was created. That is why an adjudication of the tribe's federally reserved rights is so important to the economic development of the Navajo Nation.

Petitioners' effort to deny the significance of this Court's decree in Arizona v. California, 376 U.S. 340 (1964), is unavailing. As the government has correctly observed (U.S. Memorandum 5), the decree in Arizona v. California quantified the water rights of several Indian reservations, even though the total amount of water available in the Colorado River system had not yet been determined. It is exactly such a quantification of its rights that the Navajo Nation seeks in this litigation. Petitioners' response that Arizona v. California was not a general stream adjudication (Petitioners' Memorandum 4) is irrelevant to the point for which the government and the respondent tribes have relied on that decision. The critical consideration is that this Court's decree in Arizona v. California demonstrates that it is practical to establish an individual tribe's reserved water rights in a separate proceeding that does not involve an evaluation of the total amount of water actually available. Notwithstanding this precedent, petitioners persist in arguing that what was done by this Court in Arizona v. California cannot be done here. Of course, this Court's own prior decisions are far more convincing evidence of what is workable and practical than petitioners' self-serving and unsupported assertions to the contrary.

B. RESERVED RIGHTS HELD BY INDIAN TRIBES SHOULD BE DETERMINED IN A FEDERAL FORUM, EVEN IF OTHER FEDERAL RESERVED RIGHTS ARE DECIDED IN STATE COURT

Petitioners devote the final pages of their post-argument memorandum to a renewal of the contention that all federal reserved rights must be adjudicated together in a single forum. As the government and the respondent tribes have explained at some length, however, there are fundamental distinctions between rights reserved for Indian tribes and other federally reserved rights. In this regard, we are content to rely primarily on the principal briefs for the respondent tribes and the principal brief and post-argument memorandum of the United States. We repeat only that, even if state jurisdiction over Indian water rights in disclaimer states is not absolutely foreclosed, the historical preference for federal jurisdiction reflected in Indian treaties, the disclaimer provisions, the decisions of this Court, and the congressional enactment of 28 U.S.C. 1362 are surely sufficient to show that Indian reserved rights have never been treated identically with other rights reserved by the federal government. The Court should reject petitioners' invitation to start doing so now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Motion of the Navajo Nation for Leave to File a Post-Argument Memorandum and the Post-Argument Memorandum of respondent Navajo Nation have been sent by first-class mail, postage prepaid, this 15th day of April, 1983 to:

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